IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CHRIS FOLKERS, d/b/a/ COUNCIL OVERSEEING MEDICAL& MASSAGE THERAPY ACCREDITATION, **Plaintiff,**	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 03-2399-KHV**
AMERICAN MASSAGE THERAPY ASSOCIATION, INC., d/b/a COMMISSION ON MASSAGE THERAPY ACCREDITATION; and CAROLE OSTENDORF, DIRECTOR OF COMMISSION ON MASSAGE THERAPY ACCREDITATION AND INDIVIDUALLY, **Defendants.**	)	

MEMORANDUM AND ORDER

Plaintiff pro se brings suit against American Massage Therapy Association, Inc. ("AMTA"), doing business as the Commission On Massage Therapy Accreditation ("COMTA") and Carole Ostendorf, Director of COMTA, alleging fraud (Count 1), attempted conversion (Count 2), defamation (Count 3), violation of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. (Count 4), violation of the Illinois Uniform Deceptive Trade Act, 815 Ill. Comp. Stat. 510 (Count 5), violation of the Kansas Restraint of Trade Act, K.S.A § 50-158 et seq. (Count 6), false and deceptive advertising in violation of 15 U.S.C. § 1125(a) (Count 7), interference with business expectancy (Count 8) and civil conspiracy (Count 9). This matter comes before the Court on Defendants' Motion To Dismiss (Doc. #13) filed September 15, 2003. For reasons stated below, the Court sustains defendants' motion in part.

I. Legal Standards

In ruling on a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well pleaded facts in the amended complaint and views them in a light most favorable to plaintiff. Zinermon v. Burch, 494 U.S. 113, 118 (1990). The Court makes all reasonable inferences in favor of plaintiff, and liberally construes the pleadings. Rule 8(a), Fed. R. Civ. P. 8(a); Lafoy v. HMO Colo., 988 F.2d 97, 98 (10th Cir. 1993). The Court may not dismiss a cause of action for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of its theories of recovery that would entitle it to relief. Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan., 927 F.2d 1111, 1115 (10th Cir. 1991). Although plaintiff need not precisely state each element of his claims, plaintiff must plead minimal factual allegations on material elements that must be proved. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

The Court affords a pro se plaintiff some leniency and must liberally construe the complaint. Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While pro se complaints are held to less stringent standards than pleadings drafted by lawyers, pro se litigants must follow the same procedural rules as other litigants. Hughes v. Rowe, 449 U.S. 5, 9 (1980); Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992). The Court may not assume the role of advocate for a pro se litigant. Hall, 935 F.2d at 1110.

In addition, Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The purpose of Rule 9(b) is to enable a defending party to prepare an effective response to charges of fraud and to protect the defending party from unfounded charges of wrongdoing which might injure its reputation and

goodwill. See N.L. Indus., Inc. v. Gulf & W. Indus., Inc., 650 F. Supp. 1115, 1129-30 (D. Kan. 1986). The Court must read Rule 9(b) in harmony with the simplified notice pleading provisions of Rule 8. See Cayman Explor. Corp. v. United Gas Pipe Line, 873 F.2d 1357, 1362 (10th Cir. 1989). To plead a fraud claim, plaintiff must describe the circumstances of the fraud, i.e. the time, place, and content of the false representation; the identity of the person making the representation; and the harm caused by plaintiff's reliance on the false representation. Ramada Franchise Sys., Inc. v. Tresprop, Ltd., 188 F.R.D. 610, 612 (D. Kan. 1999). Stated differently, Rule 9(b) requires plaintiff to set forth the "who, what, where, and when" of the alleged fraud. Nal II, Ltd. v. Tonkin, 705 F. Supp. 522, 525-26 (D. Kan. 1989).

II. Facts

Plaintiff alleges the following facts:

On July 16, 2003, plaintiff received a letter from defendants' attorney stating that defendants owned the certification marks "COMTA" and "Commission On Massage Therapy Accreditation." Complaint (Doc. #1) filed August 7, 2003 at 2. In the letter, defendants stated that those certification marks represent "integrity, high standards, high quality service provided by COMTA accredited schools, goodwill, and consumer, general public recognition in these certification marks." Id. at 3. The letter also stated that plaintiff's use of his certification marks – "COMMTA" and "COUNCIL OVERSEEING MEDICAL & MASSAGE THERAPY ACCREDITATION"– was unauthorized and illegal, and infringed on defendants' certifications marks. The letter charged that plaintiff had printed false and defamatory statements about COMTA. The letter stated that plaintiff's web page (www.commta.com) also contained false and defamatory statements about COMTA. Defendants' letter alleged that plaintiff was subject to liability under the Lanham Act, 15 U.S.C. § 1051 et seq., and/or the statutes and common law of various states.

Complaint (Doc. #1) at 3.

In their letter of July 16, defendants demanded that plaintiff stop using his marks and immediately transfer his internet domain name (and any other infringing domain names that plaintiff may have registered) to defendants. Defendants demanded that plaintiff take appropriate steps, approved by COMTA, to retract false and defamatory statements about COMTA.

On July 21, 2003, plaintiff wrote to defendants' counsel requesting documentation that defendants owned the certification and trademark and identification of the specific false and defamatory material. Plaintiff also asked for the formula or process which defendants utilized for their claims of "reputation of integrity; substantial goodwill, high standards and legal business structure." Id. at 4.

By letter dated July 24, 2003, AMTA told plaintiff that it established and operates COMTA. In an attempt to "fraudulently mislead plaintiff as to a US Trademark ownership of certification mark," AMTA also told plaintiff that it owns U.S. trademark Application No. 76/466224. To give the appearance of specific defamatory statements by plaintiff, AMTA inserted into plaintiff's "materials (sentences)" the word "COMTA." Id. at 5. Defendants again demanded that plaintiff stop his infringement, transfer his domain name, and retract his false and defamatory statements. Defendants also charged that plaintiff's standards were "admittedly lower" than those of COMTA. To gain an unfair trade advantage, defendants have used and allowed certain "membered schools" to use false and deceptive advertising. Defendants have made the following false and deceptive statements:

> ¶4. "An accredited school is one that meets the standards of excellence;"
>
> ¶5. "Accreditation is a voluntary process that identifies and acknowledges educational programs and/or institutions for achieving and maintaining a level of quality, performance and integrity that meets meaningful standards;"

> ¶6. "Accreditation . . . assures that students receive quality education and training, and therefore, that the industry receives competently trained practitioners and the public receives quality services;"
>
> ¶7 "COMTA [is] a non-profit independent body;"
>
> ¶8. "COMTA [is] a non-profit independent organization;"
>
> ¶9. "COMTA is affiliated with the American Massage Therapy Association;"
>
> ¶10. "COMTA is the premier independent accrediting body for the massage therapy profession;"
>
> ¶11. "COMTA accreditation is unique because: Standards of Accreditation are set by practitioners and educators in the profession;"
>
> ¶12. "[M] embered schools . . . have voluntarily taken steps to assure themselves that they meet high standards of educational excellence by going through a process called accreditation;"
>
> ¶13. " . . . Accreditation is a means of assisting private career schools and colleges to become stronger and better institutions by setting standards of educational quality."

Complaint (Doc. #1) at 11-12.

Plaintiff filed his complaint on August 7, 2004. As noted, he alleges fraud (Count 1), attempted conversion (Count 2), defamation (Count 3), violation of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. (Count 4), violation of the Illinois Uniform Deceptive Trade Act, 815 Ill. Comp. Stat. 510 (Count 5), violation of the Kansas Restraint of Trade Act, K.S.A § 50-158, et seq. (Count 6), false and deceptive advertising in violation of 15 U.S.C. § 1125(a) (Count 7), interference with business expectancy (Count 8) and civil conspiracy (Count 9). Defendants assert that all counts should be dismissed for failure to state a claim.

III. Analysis

A. Fraud (Count 1)

Defendants argue that the complaint does not state a claim for fraud. To state a claim for fraud under Kansas law, plaintiff must allege that (1) defendant made an untrue statement of fact, (2) defendant knew the statement was untrue or made it recklessly with disregard for the truth, (3) defendant made the statement with intent to induce plaintiff to act on the statement, (4) plaintiff justifiably relied on the statement to his or her detriment, and (5) plaintiff sustained injury as a result of his reliance. See Tetuan v. A.H. Robins Co., 241 Kan. 441, 465-67, 738 P.2d 1210, 1228-30 (1987); Nordstrom v. Miller, 227 Kan. 59, 65, 605 P.2d 545, 551-52 (1980); Hutchinson Travel Agency, Inc. v. McGregor, 10 Kan. App.2d 461, 463-64, 701 P.2d 977, 980 (1985).

Defendants first contend that although Count 1 quotes letters from AMTA counsel, it does not specifically identify an allegedly false statement. The Court agrees. Plaintiff sets forth 17 paragraphs that describe the two letters, and then states that "[t]he above intentional acts of the defendants were both intentional and fraudulent misrepresentations of the facts," Complaint, ¶ 24. He also alleges that "defendants knew or reasonably should have known" that their representations were false. Id., ¶ 30. The complaint, however, is not clear as to which factual statements are allegedly untrue.

Defendants also contend that plaintiff has not alleged that he detrimentally relied on the allegedly fraudulent statements. In response, plaintiff points to paragraph 18, which states as follows:

> On or about July 21, 2003, the plaintiff requested through written communication to the defendants [sic] council [sic], proof, via documentation, of the defendants [sic] claims of certification and trademark ownership, the specific false and defamatory material and the defendants [sic] formula or process utilized for its claims of their reputation of integrity; substantial goodwill, high standards, and legal business structure of defendant "Commission on Massage Therapy Accreditation."

This paragraph does not allege detrimental reliance. Paragraph 20 of the complaint alleges that "in an attempt to fraudulently mislead plaintiff," defendants represented to plaintiff that COMTA owned a trademark application. Plaintiff does not claim that he relied on the allegedly untrue statement. Plaintiff therefore has failed to state a claim for fraud and Count 1 must be dismissed.

B. Attempted Conversion (Count 2)

Defendants next assert that plaintiff's claim for "Coercion In Attempt to Convert" does not state a claim. Under Kansas law, conversion is "an intentional exercise of dominion and control over a property interest that interferes with the right of another to control the property interest and results in damages to the owner of the property interest." Nelson v. Hy-Grade Constr. & Materials, Inc., 215 Kan. 631, 527 P.2d 1059 (1974); Restatement (Second) of Torts § 222A (1964)). Plaintiff has not alleged that defendants exercised dominion or control over his property interests or interfered with his right to control those interests. Thus, as to Count 2, plaintiff has not stated a claim on which relief may be granted.

C. Defamation (Count 3)

Defendants assert that plaintiff has not stated a claim for defamation. Under Kansas law, the tort of defamation includes both libel and slander. Batt v. Globe Eng'g Co., 13 Kan. App.2d 500, 504, 774 P.2d 371 (1989). The elements of a defamation claim are (1) false and defamatory words, (2) communication to a third party, and (3) resulting harm to the reputation of the person defamed. Id. Defendants assert that plaintiff has not alleged false and defamatory words. Defendants point out that in Count 3, plaintiff simply alleges that defendants sent him a letter (with a copy to Jim Lattanzio of the National Organization for the Advancement of Massage, Schools, and Educators) and that defendants knew that the letter contained intentional and false statements. Count 3 does not specify what false and

defamatory statements the letter contained.

Plaintiff counters that Count 3 incorporates the allegations of Counts 1 and 2 and that defendants "have by their intent defamed the reputation of Plaintiff and have adversely affected his business." Plaintiff's Memorandum In Opposition (Doc. #6) filed October 8, 2003 at 6. In Counts 1 and 2 plaintiff set forth the contents of two letters from defense counsel. As noted, the recitation does not specify which parts of the letters were false and defamatory.[1] In his opposition to defendants' motion, plaintiff makes the conclusory statement that "[t]he pleadings clearly state the facts of the false statements and the circumstance as to why they were defamatory." Id.

The Court's review of the complaint discloses one statement which could clearly be false and

---

[1] Paragraphs 8 through 23 allege in part that defendants' attorney sent plaintiff a letter stating that defendants owned the certification marks "COMTA" and "Commission On Massage Therapy Accreditation. " The letter stated that these marks represent "integrity, high standards, high quality service provided by COMTA accredited school, goodwill, and consumer, general public recognition." Id. at 3. The letter further contended that plaintiff's use of the certification marks "COMMTA" and "COUNCIL OVERSEEING MEDICAL & MASSAGE THERAPY ACCREDITATION" was unauthorized and illegal and infringed on the certifications marks "COMTA" and "Commission On Massage Therapy Accreditation." The letter stated that plaintiff's web page – "www.commta.com" – also contained false and defamatory statements about the "Commission on Massage Therapy Accreditation," and that plaintiff was subject to liability under the Federal Landham Act, 15 U.S.C. § 1051 et seq., and/or statutes and common law of various states. Complaint (Doc. #1) at 3. The letter demanded that plaintiff stop using the "COMMTA" and "Council Overseeing Medical & Massage Therapy Accreditation" marks and that he take appropriate steps approved by COMTA to retract false and defamatory statements regarding COMTA. On July 21, 2003, plaintiff wrote to defense counsel and asked for documentation of defendants' claims of certification and trademark ownership and the specific false and defamatory material. AMTA responded that it established and operates COMTA, and that it owned U.S. trademark Application No. 76/466224. Defendants again demanded that plaintiff stop the infringement, transfer the domain name "www.commta.com" and retract false and defamatory statements. Defendants also stated that plaintiff's standards were "admittedly lower" than those of COMTA.

defamatory: the statement that plaintiff was committing illegal trademark infringement. Under Kansas law, a wrongful accusation of an illegal act is an attack on one's good name or reputation. Woodmont Corp. v. Rockwood Ctr. P'ship., 811 F. Supp. 1478, 1484 (D. Kan. 1993) (imputation of illegal act is defamatory under Kansas law). Plaintiff also asserts that defendants' web site includes a false and defamatory statement. Defendants appear to concede that plaintiff has adequately alleged this defamation.[2]

Defendants assert, however, that even if plaintiff has adequately alleged a false statement, he has not alleged injury to reputation. Under Fed. R. Civ. P. 9(g), "when items of special damage are claimed, they shall be specifically stated." Before Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Kansas followed the common law rule which divided libel into libel per se and libel per quod. Libel per se involved words from which malice was implied and damage was conclusively presumed. General damages from libel per se arose by inference of law and plaintiff was not obliged to establish damage by proof. See Woodmont, 811 F. Supp. at 1484. A plaintiff seeking recovery for libel per quod, however, was required to allege and prove special damages. See Gomez v. Hug, 7 Kan. App.2d 605, 612, 645 P.2d 916, 923 (1982); Woodmont, 811 F. Supp. at 1480 (citing Hartman v. Meredith Corp., 638 F. Supp. 1015, 1016 (D. Kan. 1986)).

Gertz changed the rule in Kansas (and other states which had presumed damages upon proof of libel per se), and prohibited recovery based upon that presumption. Damages recoverable for defamation may no longer be presumed; they must be established by proof, no matter what the character of the libel.

---

[2] Specifically, paragraph 45 of the complaint alleges that defendants' website included the heading "COMTA takes action to protect its name" and the statement that "COMMTA claims to offer accreditation of massage schools, based upon a fee to them."

See Gobin v. Globe Publ'g Co., 232 Kan. 1, 649 P.2d 1239 (1982) (changing previous rule that damages are presumed in defamation per se cases); see also Polson v. Davis, 895 F.2d 705, 708 (10th Cir. 1990) (recognizing change).

Plaintiff appears to argue that the statements which form the basis of his claim are defamatory per se. A statement is defamatory per se if it imputes (1) a crime, (2) a loathsome disease, (3) a person's unfitness for his trade or profession or (4) a woman's lack of chastity. Gomez, 7 Kan. App.2d at 612, 645 P.2d 924. Plaintiff argues that defendants' statements fit the third category. Actionable statements in this category must be of such a character as to disparage plaintiff's pursuit of his business. Restatement of the Law 2d (Torts) § 573, p. 192-93 (1977).

Plaintiff alleges that to the extent defendants stated that he had illegally infringed their trademark, they committed defamation per se, and therefore he need not allege special damages. At most, the web site presents a claim of defamation per quod. Therefore the question is whether plaintiff has sufficiently pled special damages based on the web site statements. See Koerner v. Lawler, 180 Kan. 318, 322, 304 P.2d 926, 929 (1956) (to state cause of action for libel or slander per quod, plaintiff must allege damage to reputation).

Paragraph 49 of the complaint alleges that defendants have "publicly defam[ed] the plaintiff and his business reputation." Paragraph 51 asserts that "defendants by their own admission knew that this [web site] would be viewed by an extraordinary number of people." In the Court's judgment, plaintiff's allegations are sufficient, just barely, to satisfy the dictates of Rule 9(g). See Koerner, 180 Kan. at 322, 304 P.2d at 929 (although petition did not in so many words allege specific damages, reasonable to infer

from publication that plaintiff suffered damage in profession and sufficiently alleged damage from libel per quod). Defendants' motion to dismiss plaintiff's defamation claim is therefore overruled as to defendants' statement that plaintiff illegally infringed their trademark, and as to the statement on the defendants' web site. Defendants' motion to dismiss Count 3 is sustained in all other respects.

D. Sherman Antitrust Act (Count 4)

Defendants next assert that plaintiff has not stated a claim under the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and 15 U.S.C. § 24 (which is actually part of the Clayton Act.). Plaintiff alleges that defendants attempted to restrain his legal rights to free trade and commerce and that they conspired to "monopolize a part of the trade and commerce among the several states." Complaint, ¶¶ 52, 55. Defendants point out that the cited antitrust sections provide only *criminal* penalties for restraint of trade. Section 4 of the Clayton Act, however, authorizes private enforcement and treble damages. 15 U.S.C. § 15. The Court therefore proceeds to defendants' alternative argument – that plaintiff has not pled a conspiracy under the Sherman Antitrust Act.

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Under the law, a conspiracy may consist of any mutual agreement or arrangement, knowingly made, between two or more competitors." Law v. Nat'l Collegiate Athletic Ass'n, 185 F.R.D. 324, 336, n.19 (D. Kan. 1999). As defendants point out, plaintiff has not alleged any contract, combination or conspiracy into which defendants entered. The complaint does not set out an alleged agreement or identify the parties to it. Section 1 of the Sherman Act does not reach conduct that is unilateral. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 775 (1984).

Plaintiff's claim could be read as a conspiracy to monopolize under Section 2. To establish such a claim, plaintiff must plead and prove (1) a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 63 F.3d 1540, 1556 (10th Cir. 1995). Again, plaintiff has not alleged or identified any combination or conspirators.

Reading the complaint liberally, plaintiff could be attempting to assert a unilateral monopolization claim. Such a claim requires (1) possession of monopoly power in a relevant market, and (2) willful acquisition of or maintenance of such power. See Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999). He has not pled sufficient facts to allege these elements. Plaintiff's antitrust claim under Count 4 therefore must therefore be dismissed.

E. Illinois Deceptive Trade Practices Act, 815 ILCH §510, et seq. (Count 5)

In Count 5 plaintiff incorporates the preceeding counts and then broadly asserts that defendants violated the Illinois Deceptive Trade Practices. Defendants assert that the Court should dismiss plaintiff's claim that they violated the Illinois Deceptive Trade Practices Act, 815 ILCH §510 et seq., because plaintiff has not alleged that defendants disparaged the "goods, services or business of another by false or misleading misrepresentation of fact" under Section (a)(8) of the Act. Defendants cite numerous cases which hold that where the alleged attack is on a business rival, as opposed to the goods, services or business of the rival, plaintiff does not state a claim. See, e.g., Allcare, Inc. v. Bork, 176 Ill. App.3d 993, 999-1001 (1988). Defendants argue that their letter to plaintiff did not touch upon the quality of his services, but rather accused him of infringing their trademark.

Plaintiff's complaint does not allege that defendants' letter disparaged the quality of his services. The Court therefore finds that Count 5 should be dismissed.

F. Kansas Restraint of Trade Act, K.S.A. § 50-158 et seq. (Count 6)

Plaintiff asserts that defendants violated the Kansas Restraint of Trade Act ("KRTA"), but he does not cite which specific provision he relies upon. Defendants ask the Court to dismiss Count 6 because plaintiff has not stated a claim on which relief can be granted.

The only civil causes of action under the KRTA are those contained in §§ 50-112 and 50-113. Section 50-112 provides as follows:

> **Trusts, combinations and agreements in restraint of trade and free competition declared unlawful.**
>
> All arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

Section 50-113 provides as follows:

> **Trust certificates; creation of trusts**.
>
> It shall be unlawful for any corporation to issue or to own trust certificates, other than the regularly and lawfully authorized stock thereof, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit

> or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.

The Kansas antitrust statutes are broad and undeveloped by case law. See Bergstrom v. Noah, 266 Kan. 829, 843, 974 P.2d 520, 530 (1999) (no meaningful interpretation of statutes in Kansas). In Bergstrom, the Kansas Supreme Court summarized the state of the law, noting that "the statutes have been virtually ignored by the bar, with only a few cases coming to this court since their enactment." Id. Before Bergstrom, the Kansas Supreme Court's last antitrust case was Okerberg v. Crable, 185 Kan. 211, 341 P.2d 966 (1959), a 1959 case which applied Sections 50-101 and 50-112 to a regulation that set routes among milk carriers. See also Bergstrom, 266 Kan. at 844, 974 P.2d at 530 (Kansas antitrust act "very sweeping;" definitions of trusts couched in general terms but cover "almost every conceivable device by which freedom of commerce might be hampered, competition restricted, or the price of commodities controlled") (citing State v. Wilson, 73 Kan. 334, 337, 80 P. 639 (1905)).

Although cases which address federal antitrust statutes are not binding, they are persuasive in this undeveloped area of state law. See Bergstrom, 266 Kan. at 844-45, 974 P.2d at 530-31; see also Orr v. BHR, Inc., No. 00-3135, 2001 WL 135439, at *2 (10th Cir. Feb. 16, 2001) (plaintiff who lacked antitrust standing under federal law also lacked standing under Kansas law). The inquiry requires the Court to preliminarily identify the state antitrust provisions under which plaintiff proceeds and the most analogous federal antitrust statutes. This inquiry is impossible here, because plaintiff does not refer to particular sections of the Kansas statutes. Plaintiff's KRTA count first incorporates all paragraphs (1 through 55) and then states as follows:

> The above acts of the defendants were both intentional and fraudulent misrepresentations

> of the facts and truth in an attempt to restrain plaintiff's trade which constitute a violation of the Kansas Restraint of Trade Act at K.S.A. 2002 Supp. 50-158 et seq.

Complaint (Doc. # 1), ¶ 57, p. 10-11. This statement does not sufficiently put defendants on notice of the claim against them. The Court therefore sustains defendants' motion to dismiss as to Count 6.

G. Lanham Act, 15 U.S.C. §1125 False And Deceptive Advertising (Count 7).

Plaintiff also brings suit under the Lanham Act, 15 U.S.C. § 1125(a), which provides in pertinent part as follows:

> (**a) Civil action.** (1) Any person who, on or in connection with any goods or services, uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which--
>
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a). To state a claim for false advertising under Section 1125(a), plaintiff must plead the following elements:

> (1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to (a) the origin, association or approval of the product with or by another, or (b) the characteristics of the goods or services; and (4) injure the plaintiff.

Cottrell, Ltd. v. Biotrol Int'l., Inc., 191 F.3d 1248, 1252 (10th Cir. 1999) (internal citations omitted). Plaintiff alleges that defendants made the following false or deceptive representations through direct advertising on their web sites, mail-out marketing, media advertisements and "membered" schools:

> ¶4. "An accredited school is one that meets the standards of excellence;"

¶5. "Accreditation is a voluntary process that identifies and acknowledges educational programs and/or institutions for achieving and maintaining a level of quality, performance and integrity that meets meaningful standards;"

¶6. "Accreditation . . . assures that students receive quality education and training, and therefore, that the industry receives competently trained practitioners and the public receives quality services;"

¶7 "COMTA [is] a non-profit independent body;"

¶8. "COMTA [is] a non-profit independent organization;"

¶9. "COMTA is affiliated with the American Massage Therapy Association;"

¶10. "COMTA is the premier independent accrediting body for the massage therapy profession;"

¶11. "COMTA accreditation is unique because: Standards of Accreditation are set by practitioners and educators in the profession;"

¶12. "[M] embered schools . . . have voluntarily taken steps to assure themselves that they meet high standards of educational excellence by going through a process called accreditation;"

¶13. " . . . Accreditation is a means of assisting private career schools and colleges to become stronger and better institutions by setting standards of educational quality."

Complaint (Doc. #1) at 11-12.

Defendants assert that plaintiff has not stated a Lanham Act claim because (1) the allegedly false statements are not quantifiable or objectively verifiable but are mere puffery and they are therefore not cognizable as false advertising; (2) plaintiff does not claim that the allegedly deceptive statements deceived or likely deceived the massage therapy school industry; and (3) plaintiff has not alleged injury from the allegedly false or misleading statements.

Subjective claims about products, which cannot be proven either true or false, are not actionable;

they are mere "puffing." Lipton v. Nature Co., 71 F.3d 464, 474 (2d Cir. 1995); see, e.g., Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch, 292 F. Supp.2d 535, 552 (S.D.N.Y. 2003) (statement that pants are "most original" is obvious puffery; no way to prove pants more or less more original than others). The following statements from the complaint are not statements of fact which can be proven true or false: (1) "An accredited school is one that meets the standards of excellence" (¶4); (2) "Accreditation is a voluntary process that identifies and acknowledges educational programs and/or institutions for achieving and maintaining a level of quality, performance and integrity that meets meaningful standards" (¶5); (3) "Accreditation . . . assures that students receive quality education and training, and therefore, that the industry receives competently trained practitioners and the public receives quality services" (¶6); (4) "COMTA is the premier independent accrediting body for the massage therapy profession" (¶10)." See, e.g., CollegeNet, Inc. v. Embark.Com, Inc., 230 F. Supp.2d 1167 (D. Or. 2001) ("top universities" too vague to be actionable). Any claims which are based on those statements are therefore dismissed.

Defendants also argue that plaintiff has not alleged actual or likely deception or injury. The complaint does not allege that plaintiff suffered any loss of sales or reduction in good will. Plaintiff must plead that he has been or is likely to be injured as a result of the false advertisement. See Cook, Perkiss &Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 244 (9th Cir. 1990). The Court therefore finds that Count 7 does not state a Lanham Act claim.

H. Interference With Business Expectancy (Count 8)

Plaintiff claims that all facts in the proceeding counts state a claim for tortious interference with prospective business advantage. Defendants assert that this claim should be dismissed because plaintiff has not alleged a prospective business expectancy. To state a claim for tortious interference with a business

expectancy, plaintiff must allege

> (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff;
> (2) knowledge of the relationship or expectancy by the defendant;
> (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy;
> (4) intentional misconduct by defendant; and
> (5) damages suffered by plaintiff as a direct or proximate cause of defendant's misconduct.

Turner v. Halliburton Co., 240 Kan. 1, 12, 722 P.2d 1106 (1986).

Although defendants assert that plaintiff does not allege a prospective business expectancy, they ignore paragraphs 42 through 51, which Count 8 incorporates. Those paragraphs allege that plaintiff had business relations with the National Organization for the Advancement of Massage, Schools and Educators. Even so, plaintiff has not alleged that except for defendants' conduct, he was reasonably certain to have continued the relationship or realized the expectancy. Therefore plaintiff has not stated a claim for interference with a business expectancy and Count 8 is dismissed.

I. Civil Conspiracy, 18 U.S.C. Section 371 (Count 9)

Count 9 alleges that defendants engaged in a civil conspiracy in violation of 18 U.S.C. § 371. Defendants assert that Count 9 does not state a claim, correctly pointing out that Section 371 is a criminal statute and that plaintiff does not have standing to bring criminal charges against them. Further, to the extent that plaintiff attempts to state a claim for common law conspiracy, he has not pled the elements of such a claim: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.

Stoldt v. City of Toronto, 234 Kan. 957, 967, 678 P.2d 153 (1984).[3] Count 9 does not state a claim for civil conspiracy, and it is hereby dismissed.

IT IS THEREFORE ORDERED that Defendants' Motion To Dismiss (Doc. #13) filed September 15, 2003 be and hereby is **OVERRULED** as to plaintiff's defamation claim (Count 3) based on defendants' statement that plaintiff illegally infringed defendants' trademark and as to the statement on the web site. **Defendants' motion is OTHERWISE SUSTAINED.**

Dated this 10th day of February, 2004 at Kansas City, Kansas.

s/Kathryn H. Vratil
Kathryn H. Vratil
United States District Court

---

[3] 18 U.S.C. Section 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.